

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
GARDEN CITY PARK FIRE DISTRICT, NEW YORK)	File No. 0003808598
)	
Request for Waiver of Sections 20.9(a)(6), 22.621, 22.623(b), and 22.651 of the Commission's Rules)	

ORDER

Adopted: May 2, 2011**Released: May 2, 2011**

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The Garden City Park Fire District, New York (Garden City Park or the Fire District), filed an application with an associated Waiver Request¹ for authority to use “the frequency pair 476.0625/473.1250 MHz ... to contact Department members ... and to facilitate communications between Department members and the Department’s dispatcher.”² Since the frequencies are within spectrum allocated for Part 22 point-to-point and trunked mobile operations, Garden City Park seeks waiver pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act),³ of Sections 20.9(a)(6), 22.621, 22.623, and 22.651 of the Commission’s rules,⁴ to use these frequencies for public safety purposes. In the alternative, the Fire District seeks a waiver pursuant to Section 1.925 of the Commission’s rules.⁵ By this Order, we grant the Waiver Request as discussed herein.⁶

II. BACKGROUND

2. The Fire District is part of a combined water and fire district that covers a one square mile area in Nassau County, New York.⁷ As the parent agency of the all-volunteer Garden City Park Fire Department, the Fire District is responsible for insuring that its 115 volunteer members are able to provide both the fire and ambulance services necessary to protect “approximately 7,500 residential and commercial addresses and a population of approximately 25,000.”⁸ The Fire District states that its volunteers “currently use ‘low band’ (46 MHz) channels through agreements with neighboring fire departments” but continued “[u]se of a shared frequency is untenable because the frequency is overloaded

¹ See File No. 0003808598 (filed April 15, 2009, as amended June 12, 2009 and August 18, 2009).

² See Application, attached Request for Waiver, dated August 18, 2009 (Waiver Request) at 3.

³ 47 U.S.C. § 337(c).

⁴ 47 C.F.R. §§ 20.9(a)(6), 22.621, 22.623, and 22.651.

⁵ 47 C.F.R. § 1.925; Waiver Request at 14.

⁶ The application also proposes the use of frequency 465.15 MHz. This frequency is included in the Public Safety Pool (see 47 C.F.R. § 90.20) and is not included in the waiver request.

⁷ Waiver Request at 1.

⁸ *Id.*

and does not meet the District's requirements."⁹ Furthermore, the Fire District argues that "the current low band channel provides poor in-building coverage and only slightly better street-level coverage."¹⁰

3. Garden City Park seeks authority to use frequencies 476.0625 and 473.1250 MHz as the basis of a public safety communications system that will enable it to improve communications among firefighters, officers, chiefs, and dispatchers, thus enhancing firefighter safety and community service.¹¹ Since the proposed frequencies are within spectrum governed by Part 22, and therefore allocated for commercial mobile use, the Fire District seeks waiver relief to utilize the frequencies for public safety communications purposes.¹² Specifically, the Fire District seeks waiver of the following rules: Section 20.9(a)(6), which provides that the proposed frequencies shall be assigned for commercial mobile radio services;¹³ Section 22.621, which provides that frequency 476.0625 MHz is designated point-to-multipoint operation;¹⁴ Section 22.623(b), which requires that the channels may be assigned in an unpaired configuration only to control base stations in the public mobile service;¹⁵ and Section 22.651, which designates frequencies immediately adjacent to 473.1250 MHz for trunked mobile service.¹⁶

4. The Fire District cites numerous Commission precedents in support of its assertion that "there are no channels available for use by public entities in the New York metropolitan area, which includes the geographic area covered by the District."¹⁷ Further, the Fire District discounts 700 MHz spectrum as a viable option in light of the need to interoperate with numerous nearby jurisdictions that have been authorized to operate on the proposed frequencies. In particular, the Fire District cites the need to coordinate with Nassau County's authorized operations on TV Channel 19 and the lack of equipment capable of operating in both portions of the spectrum.¹⁸ Additionally, the Fire District references studies performed by Forestry Conservation Communications Association (FCCA, an FCC-certified frequency coordinator) to demonstrate that the proposal will satisfy the relevant co-channel and adjacent channel analyses with respect to both TV and land mobile operations.¹⁹ Overall, the Fire District concludes that it has met the criteria set forth in Section 337(c) justifying the proposed waivers of the Commission's technical rules.²⁰ Further, the Fire District believes that, should the staff not agree that Section 337(c) of the Act has been satisfied that sufficient justification has been provided to otherwise justify the grant of the requested waivers.²¹

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 11-13.

¹³ 47 C.F.R. § 20.9(a)(6).

¹⁴ 47 C.F.R. § 22.621.

¹⁵ 47 C.F.R. § 22.623(b).

¹⁶ 47 C.F.R. § 22.651 (listing frequencies 473.1125 and 473.1375 MHz).

¹⁷ Waiver Request at 5-6.

¹⁸ *Id.* at 7-8.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 4.

²¹ *Id.* at 14-15.

5. On November 12, 2009, the Public Safety and Homeland Security Bureau (Bureau) issued a Public Notice seeking comment on the application and Waiver Request.²² The Bureau also sought comment on whether the 700 MHz public safety band would provide a viable alternative, in light of the digital television transition and the Commission's recent actions to facilitate a 700 MHz nationwide, interoperable public safety network.²³ We received no comments addressing the merits of the application and Waiver Request.

III. DISCUSSION

6. Section 337(c) of the Act provides that the Commission "shall waive . . . its regulations implementing th[e] Act (other than its regulations regarding harmful interference) to the extent necessary to permit" entities "seeking to provide public safety services" to use unassigned spectrum not allocated to public safety if the Commission makes five specific findings: (i) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use; (ii) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations; (iii) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.²⁴

7. When considering waiver requests filed pursuant to Section 337(c) of the Act, we must first determine whether the applicant is an "entity seeking to provide public safety services."²⁵ The Act defines public safety services as "services – (A) the sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided – (i) by State or local government entities; or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider."²⁶ The Fire District is "a local government entity," and it "employs firefighters to protect the health and welfare of its citizens."²⁷ Based on the information before us, Garden City Park is an entity that provides public safety services.

8. Next, we consider whether the Fire District's petition satisfies the specific showing requirements mandated by Section 337(c) of the Act. We note that an applicant's failure to meet any one of the five criteria constitutes sufficient cause for the Commission to deny a request for waiver under Section 337(c).²⁸

²² See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed By the Garden City Park Fire District, New York to Operate a Public Safety Communications System by Adding Part 22 Frequencies From 470-512 MHz Band, *Public Notice*, 24 FCC Rcd 13723 (2009).

²³ Waiver Request at 3.

²⁴ 47 U.S.C. § 337(c).

²⁵ See 47 U.S.C. § 337(f).

²⁶ *Id.*

²⁷ Waiver Request at 5.

²⁸ See South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998) (*South Bay*); Township of Cinnaminson, New Jersey, *Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (PSHSB 2007) (*Cinnaminson*), citing University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 2001). See also Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000).

9. Initially, we consider whether “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” pursuant to subsection 337(c)(1)(A).²⁹ With regard to this prong, Garden City Park relies on earlier decisions where the Commission determined that there are no “exclusive UHF channels available for public safety entities in the New York metropolitan area, which includes the geographic area served by the District.”³⁰ As further support, Garden City Park indicates that the proposed frequencies will enable it to be interoperable with the Nassau County Police Department, which was previously authorized by the Commission to operate on UHF TV Channel 19.³¹ Furthermore, in addition to its home county, the Fire District cites the need to maintain communications with the numerous neighboring jurisdictions that utilize frequencies in the 470-512 MHz band.³²

10. In light of these requirements, Garden City Park asserts that utilizing 700 MHz spectrum would not be “a responsible option for the Fire District” because “there is no equipment readily available today that can effectively accommodate both 500 MHz and 700 MHz spectrum” and “it is not in the public interest to require the Fire District to purchase two sets of radios – one for its own operations and one for interoperable communications.”³³ According to Garden City Park, the requested public safety service use would be used to conduct voice dispatch and fireground operations that are interoperable with a majority of New York City-area public safety entities that operate in the 470-512 MHz band.³⁴ In conclusion, the Fire District states that “it is not a requirement under Section 337 of the Act that the Fire District demonstrate that the target spectrum is the only alternative for its use. Instead the Fire District is required to demonstrate that the Frequencies are the only alternative available to meet its needs.”³⁵

11. Based on our review of the record, we find that, despite its assertions, Garden City Park has not demonstrated that no other spectrum allocated to public safety services is immediately available as required by the statute.³⁶ A previous finding of insufficient public safety channel availability in an area, while relevant, does not address changes in the spectrum landscape over time that must be considered. Since the cited cases were decided, broadcasters have vacated the 700 MHz band as a result of the June 12, 2009, conclusion of the DTV transition. In addition, the Bureau approved the Region 8 (New York Metropolitan Area) 700 MHz Regional Plan.³⁷ Accordingly the 700 MHz public safety channels are immediately available and ready for assignment.

²⁹ 47 U.S.C. § 337(c)(1)(A).

³⁰ See Waiver Request at 5-6, *citing e.g.*, Seven Public Safety Agencies in the New York Metropolitan Area, Proposal to Use Part 22 Paging Frequencies Pursuant to Section 337(c) of the Communications Act of 1934, *Order*, 19 FCC Rcd 15355 (WTB PSCID 2004); Attorney General’s Office of the State of New Jersey, *Order*, 20 FCC Rcd 10109 (WTB PSCID 2005).

³¹ See Waiver request at 7-8, *citing*, Nassau County Police Department and Waiver Request for Waiver for a Public Safety License Pursuant to Section 337 of the Communications Act of 1934, as Amended, *Memorandum Opinion and Order*, 17 FCC Rcd 14252 (WTB PSPWD 2002).

³² Waiver Request at 8; and attached Schedule A at 1-2.

³³ Waiver Request at 7-8.

³⁴ See *id.* at 4, 8.

³⁵ *Id.* at 8.

³⁶ 47 U.S.C. § 337(c)(1)(A).

³⁷ See Public Safety and Homeland Security Bureau Approves Region 8 (New York Metropolitan Area) 700 MHz Regional Plan, PS Docket No. 06-229, WT Docket No. 02-378, DA 09-1009 (PSHSB rel. May 4, 2009).

12. It is insufficient that an applicant show only the unavailability of frequencies in its preferred public safety band or the unsuitability of frequencies in other public safety bands.³⁸ Thus, because Garden City Park has not shown the unavailability of 700 MHz public safety frequencies, we find that it has not satisfied subsection 337(c)(1)(A). Having made this finding, we need not address its arguments regarding the remaining four criteria.³⁹

13. However, our finding that Garden City Park does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose our consideration of Garden City Park's alternative request for waiver relief pursuant to Section 1.925 of the Commission's rules.⁴⁰ Section 1.925 provides the Commission the necessary flexibility to achieve its statutory objective of safeguarding life and property by considering an applicant's request for waiver relief according to the standards that an applicant must meet under the rule.⁴¹ From our review of the record in this case, we find that Garden City Park has presented sufficient information for us to consider whether waiver relief is justified under Section 1.925.

14. Section 1.925 states that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;⁴² or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁴³ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁴⁴ Based on the information before us, we conclude that a grant of Garden City Park's Waiver Request is warranted under the first prong of the waiver standard. We proceed with analyses of each rule for which Garden City Park requests waiver.

³⁸ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted); see also H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) ("spectrum must not be immediately available on a frequency already allocated to public safety services."); County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167-68 ¶ 6 (PSHSB PD 2007); State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000).

³⁹ See, e.g., Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, the Wireless Telecommunications Bureau did not address remainder); New Hampshire Department of Transportation (NHDOT), *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, the Wireless Telecommunications Bureau noted that it "need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.").

⁴⁰ See Ocean County, New Jersey, *Order*, 24 FCC Rcd 11299 (PSHSB PD 2009) at 7 ¶ 16; *Balanced Budget Act Report and Order* at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. See also Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & n.30 (WTB MD 2007) (noting that "[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules."); see also 47 U.S.C. §§ 151, 154(i), 303(r).

⁴¹ See 47 C.F.R. 1.925 (providing that "[t]he Commission *may* waive specific requirements of the rules upon its own motion or upon request") (emphasis added). See 47 C.F.R. § 1.925(b)(3)(i)-(ii) (setting forth the criteria).

⁴² 47 C.F.R. § 1.925(b)(3)(i).

⁴³ 47 C.F.R. § 1.925(b)(3)(ii).

⁴⁴ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broad. Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

15. *Sections 22.621 and 22.651.* We begin our analysis by examining whether the waiver would undermine the purpose of the rules sought to be waived. The underlying purpose of Section 22.621 is to reserve certain frequencies “for assignment to transmitters utilized within point-to-multipoint systems that support transmitters that provide public mobile service.”⁴⁵ The underlying purpose of Section 22.651 is to reserve certain frequencies “for assignment to transmitters providing trunked public mobile service” in certain urbanized areas.⁴⁶ Accordingly, we evaluate the Part 22 licensing landscape in the New York City metropolitan area. There are no Part 22 entities licensed on the frequencies sought by Garden City Park or on the upper and lower adjacent main channels listed in the Part 22 rules. Further, due to the presence of several incumbent public safety licensees who obtained authorizations by prior waivers, as described in the next paragraph, no Part 22 entities could be licensed on frequencies 476.0625 MHz and 473.1250 MHz in the New York City urbanized area. Based on the foregoing analysis, we find that the underlying purposes of Sections 22.621 and 22.651 would not be served or would be frustrated by application to the present case.

16. *Protection of Co-Channel and Adjacent Channel Licensees.* While the Commission’s Part 22 rules do not require a showing of interference protection for incumbent public safety licensees operating on Part 22 spectrum by waiver, we have the discretion to apply land mobile interference protection criteria to examine whether Garden City Park would cause harmful interference to other public safety entities in the New York City urbanized area operating co-channel or adjacent channel to frequencies 476.0625 MHz and 473.1250 MHz.⁴⁷ First, we analyze the impact of the Fire District’s proposed operation on co-channel licensees. Section 90.313(c) provides that a “frequency pair may be reassigned at distances 64 km ... or more from the location of base stations authorized on that pair ...”⁴⁸ We have verified that there are no licensed co-channel facilities within 64 kilometers of Garden City Park’s proposed base stations on either frequency.⁴⁹ Therefore, the application satisfies the co-channel separation requirements of Section 90.313(c).⁵⁰

17. We also find that the Fire District’s proposed operations will not cause harmful interference to adjacent channel licensees. With regard to frequency 476.0625 MHz, the lower adjacent channel, frequency 476.0500 MHz, is assigned to the Borough of Fort Lee, New Jersey,⁵¹ and the upper adjacent channel, frequency 476.07500 MHz, is assigned to the County of Westchester, New York.⁵² Because both entities use 11.25 kHz bandwidth, there would be no bandwidth overlap from Garden City Park’s proposed 11.25 kHz bandwidth operation on frequency 476.0500 MHz. With regard to frequency 473.1250 MHz, the Jersey City Police Department, is licensed to operate WQBL368 on lower adjacent channel frequency 473.1125MHz. In this regard, the Fire District states that, WQBL368, which is as close as 33 kilometers to the proposed operations, “uses that frequency only within 10 kilometers of Jersey City, New Jersey[,] and the Fire District proposes to use the adjacent channel 473.1250 MHz within 8 kilometers of two locations in Garden City Park. There is no overlap in the two areas of

⁴⁵ 47 C.F.R. § 22.621.

⁴⁶ 47 C.F.R. § 22.651.

⁴⁷ See, e.g., Baldwin Fire District, New York, *Order*, 24 FCC Rcd 11857, 11868 ¶ 28 (PSHSB PD 2009).

⁴⁸ 47 C.F.R. § 90.313(c).

⁴⁹ On frequency 476.0625 MHz, the County of Somerset, New Jersey (Somerset) operates Stations WPPB311, WQBL360, and WQBL367. The Fire District’s proposed fixed sites are no closer than 68 kilometers to any Somerset location. There are no facilities licensed to operate on frequency 473.1250 MHz within 100 kilometers of Fire District’s proposed fixed stations.

⁵⁰ *Id.*

⁵¹ See call sign WQBL382.

⁵² See call signs WQBR539 and WQGI890.

operation.”⁵³ We further note that there would be no overlap of spectrum, since Garden City Park and Jersey City both would operate with 11.25 kHz bandwidth. Finally, the upper-adjacent channel frequency 473.1375 MHz is assigned to the Syosset, New York Fire District (Syosset) under call sign WPYJ816 for mobile station and control station operations using 11.25 kHz bandwidth.⁵⁴ Likewise, there would be no overlap of spectrum with Syosset. Thus, we find that Garden City Park’s proposed operations would not cause harmful interference to either incumbent co-channel or adjacent channel entities.

18. *Public Interest.* We conclude that granting the application is consistent with the public interest. Specifically, the Fire District has shown that grant of the waiver will provide it with access to additional UHF spectrum in order to promote effective public safety communications without compromising radio operations of other licensees. Garden City Park’s request would allow it to overcome capacity and coverage problems that plague its current “low band” license WQEP916.⁵⁵ We find it significant that granting the instant application and request will improve the coordination of fire and rescue services throughout the Fire District.⁵⁶ Additionally, the application would promote interoperability by allowing the Fire District to participate in the Nassau County Police Department’s “new countywide multi-agency trunked radio system.”⁵⁷ Further, the requested frequencies would allow communication with numerous nearby jurisdictions that have already received waivers to operate in the 470-512 MHz band.⁵⁸ We therefore find that, notwithstanding the availability of 700 MHz public safety spectrum, the proposed network furthers the public interest by affording Garden City Park’s public safety community with the necessary spectrum to allow it to protect the lives and property in its care. Finally, we note that no commenter opposed Garden City Park’s applications and request for waiver.

19. *Sections 20.9(a)(6) and 22.623(b).* Section 20.9(a)(6) presumes that the proposed frequencies will be reserved for common carriage services and regulated as commercial mobile radio services.⁵⁹ Because we find that it is in the public interest to allow Garden City Park to use frequencies 476.0625 and 473.1250 MHz for public safety purposes, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its application to the present case. Additionally, the Fire District will need a waiver of Section 22.623(b) to operate on the 476.0625 MHz.⁶⁰ Section 22.623(b) specifies system configuration requirements for paging control channels assigned pursuant to Part 22. Since the Fire District would not be operating a paging control channel on this frequency, the underlying purpose of Section 22.623(b) would not be served by application to the present case. Accordingly, Garden City Park’s request for relief is warranted because it satisfies the first prong of the Section 1.925 waiver standard. Consequently, we waive Section 22.623(b).

IV. CONCLUSION

20. Based on the foregoing, we conclude that granting the instant application would not frustrate the underlying purpose of the rules at issue and is consistent with the public interest. We therefore find that Garden City Park satisfies the first prong of the waiver standard, and accordingly grant Garden City Park a waiver of Sections 20.9(a)(6), 22.621, 22.623(b), and 22.651 pursuant to Section

⁵³ See Waiver Request at 9, n.14.

⁵⁴ See call sign WPYJ816.

⁵⁵ Waiver Request at 2.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 8.

⁵⁹ See 47 C.F.R. § 20.9(a)(6).

⁶⁰ 47 C.F.R. § 22.623(b).

1.925(b)(3) of the Commission's rules, to operate a public safety communications system on a Part 22 frequency in the 470-512 MHz band.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925, that the Request for Waiver, as amended, associated with File No. 0003808598 filed by the Garden City Park Fire District, New York IS GRANTED, to the extent indicated herein.

22. IT IS FURTHER ORDERED that File No. 0003808598 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

23. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
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Public Safety and Homeland Security Bureau